



## **Better Regulation**

# **Explanatory Statement Confidentiality Guideline**

November 2013

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## Shortened forms

Shortened term	Full title
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Confidentiality Guideline	Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines
CRG	Customer Reference Group
DNSP	Distribution Network Service Provider
draft Explanatory Statement	Explanatory Statement to the draft Confidentiality Guideline
Information Provider	<p>Includes both:</p> <ul style="list-style-type: none"> <li>▪ a person who gives information to the AER; and</li> <li>▪ if the person who gives the information to the AER in turn received that information from another person, that other person.</li> </ul>
EBSS	Efficiency Benefit Sharing Scheme
ENA	Energy Networks Association
EUAA	Energy Users Association of Australia
MEU	Major Energy Users
NEL	National Electricity Law
NER	National Electricity Rules
NGL	National Gas Law
NGR	National Gas Rules
NSP	<p>Includes both:</p> <ul style="list-style-type: none"> <li>▪ a Network Service Provider (electricity) and</li> <li>▪ a Service Provider (gas)</li> </ul>
Regulatory Proposal	Includes the following: initial regulatory proposal, revised regulatory proposal, initial revenue proposal, revised revenue proposal, proposed negotiating framework, revised proposed negotiating framework, proposed pricing methodology and revised proposed pricing methodology.
RIN	Regulatory Information Notice
Stakeholder	Includes the following: NSPs, consumer/customer groups and other persons whose interests may be affected by an AER decision.

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## Summary

This Explanatory Statement accompanies the Distribution Confidentiality Guidelines and the Transmission Confidentiality Guidelines (the Confidentiality Guideline) which outlines the manner in which transmission network service providers and distribution network service providers (NSPs) must make confidentiality claims. We require NSPs to justify all confidentiality claims and to classify them into specific categories. This Explanatory Statement sets out our reasons for the Confidentiality Guideline and provides practical guidance on the types of documents NSPs should place in the public domain.

Stakeholders<sup>1</sup> should work together to develop and implement measures that both disclose the substance of issues and appropriately maintain confidentiality, in the long term interests of consumers. We aim to balance protecting confidential information with disclosing information for an open and transparent regulatory decision making process. We consider this balance involves all Stakeholders having access to sufficient information to understand and assess the substance of issues affecting their interests.

Informal, collaborative discussions are the focus of our approach to dealing with confidential information. We want to work with Stakeholders prior to a NSP submitting information to reach a shared understanding of confidentiality issues. We also expect Stakeholders to work with each other before information is submitted to seek to resolve confidentiality issues. Our aim is to reach agreement on as many confidentiality claims as possible during this pre-lodgement phase.

Where we are unable to reach agreement informally, we will use our information disclosure powers. This is not our preference. These powers are formal and resource intensive. However, we consider they are a necessary backstop to provide incentives for NSPs and other Stakeholders to reach agreement and develop their own methods for sharing information. We will take into account any engagement between NSPs and other Stakeholders in relation to confidentiality issues when determining whether to use our information disclosure powers. We consider this provides a balanced incentive for all parties to act reasonably in trying to reach agreement, minimising the need for us to use our powers. Also, to make the Confidentiality Guideline as useful as possible, we have included a list of documents that we generally consider should be in the public domain.

In accordance with clauses 6.16(b)(2) and 6A.20(b)(2) of the National Electricity Rules (NER) we have published this Explanatory Statement. It sets out the relevant NER provisions under which the Confidentiality Guideline is made. However, we have also used this Explanatory Statement as an opportunity to outline the reasons for our overall approach to dealing with confidential information. In developing the Confidentiality Guideline and supporting Explanatory Statement, we have considered the views of Stakeholders in detail.

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<sup>1</sup> Includes the following: NSPs, consumer/customer groups and other persons whose interests may be affected by an AER decision. Including NSPs within this definition is particularly important for the Confidentiality Guideline as, in regulatory decision making, one NSP may provide information that affects the interests of another NSP e.g. benchmarking information.

# 1 Introduction

The AER is Australia's independent national energy market regulator. We are guided in our role by the objectives set out in the National Electricity and Gas Laws which focus us on promoting the long term interests of consumers.

In 2012, the Australian Energy Market Commission (AEMC) changed the rules governing how we determine the total amount of revenue each electricity and gas network business can earn. The Council of Australian Governments also agreed to consumer-focused reforms to energy markets in late 2012.

The Better Regulation program we initiated is part of this evolution of the regulatory regime. It includes:

- seven new guidelines outlining our approach to network regulation under the new regulatory framework
- a consumer reference group (CRG) to help consumers engage and contribute to our guideline development work
- an ongoing Consumer Challenge Panel (appointed 1 July 2013) to assist us to incorporate consumer interests in revenue determination processes.

These changes include new rules regarding the manner in which NSPs must make confidentiality claims over information they submit during the regulatory determination process. The new rules require us to make and publish Distribution Confidentiality Guidelines and Transmission Confidentiality Guidelines. We have decided to deal with both guidelines together in a single set of guidelines (the Confidentiality Guideline).<sup>2</sup> The Confidentiality Guideline must specify the manner in which NSPs may make confidentiality claims.<sup>3</sup> They may also include categories of confidential information by which NSPs must classify any claims of confidentiality in their Regulatory Proposals. There must be a Confidentiality Guideline in force at all times after the date on which we first publish the Confidentiality Guideline.<sup>4</sup> The Confidentiality Guideline will be binding on us and NSPs.<sup>5</sup> The new rules do not change our existing obligations to protect information and our information disclosure powers.

An intended outcome of the AEMC's rule changes was to facilitate more timely and meaningful engagement between the AER, consumer representatives and NSPs.<sup>6</sup> Our first step in consulting on the Confidentiality Guideline was to publish an issues paper on 18 March 2013.<sup>7</sup> This issues paper outlined our experience in dealing with confidentiality claims and using our information disclosure powers. We also held a workshop with Stakeholders to discuss aspects of our issues paper on 4 April 2013.<sup>8</sup> We received a total of 17 submissions from Stakeholders on our issues paper. We also offered to have a one on one meeting with each Stakeholder. Ten Stakeholders took up this offer. We also received a number of submissions from consumer representatives through our CRG meetings.

## National electricity and gas objectives

The objective of the National Electricity and Gas Laws is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to—

(a) price, quality, safety, reliability and security of supply of energy; and

(b) the reliability, safety and security of the national energy systems.

<sup>2</sup> NER, cl.6.2.8(a)(1) & cl.6A.2.3(a)(1).

<sup>3</sup> NER, cl.6.14A(b) & cl.6A.16A(b).

<sup>4</sup> NER, cl.6.14A(c) & cl.6A.16A(c).

<sup>5</sup> NER, cl.6.14A(d) & cl.6A.16A(d).

<sup>6</sup> AEMC, Final rule change determination, 29 November 2012, p.32.

<sup>7</sup> <http://www.aer.gov.au/node/18888>

<sup>8</sup> <http://www.aer.gov.au/node/18888>

We published our draft Confidentiality Guideline and supporting Explanatory Statement on 9 August 2013. We received a total of 12 submissions from Stakeholders on our draft Confidentiality Guideline and draft Explanatory Statement. We again offered to have a one on one meeting with each Stakeholder. Five Stakeholders took up this offer. We also received submissions from consumer representatives through our CRG meetings. In addition, we sought comments from NSPs on extending the Confidentiality Guideline to annual pricing proposals.<sup>9</sup> We received six responses.<sup>10</sup>

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<sup>9</sup> AER email, 21 October 2013.

<sup>10</sup> Envestra email, 24 October 2013.  
ENA email, 25 October 2013.  
SP AusNet email, 25 October 2013.  
APA Group letter, 25 October 2013.  
Ergon Energy letter, 25 October 2013.  
NSW DNSPs email, 28 October 2013.



## 2 Overview of our approach

We seek to balance protecting confidential information with disclosing information for an open and transparent regulatory decision making process. We consider the balance involves Stakeholders having access to sufficient information to understand and assess the substance of all issues affecting their interests. This is not equivalent to public disclosure of every piece of information NSPs provide, especially where public disclosure is likely to harm the long term interests of consumers.<sup>11</sup> However, the complex nature of economic regulation requires being able to understand and assess the substance of all issues which requires access to detailed information.

For these reasons, the Confidentiality Guideline aims to provide incentives for Stakeholders to work together. Stakeholders should develop and implement a range of options that both disclose the substance of all issues and appropriately maintain confidentiality where this is in the long term interests of consumers. In particular, we hope these discussions focus on developing a shared practical understanding of the detailed information and access necessary to strike the balance we seek. For example, these options might include any mix of the following:

- narrower confidentiality claims
- limited redactions in public versions of documents
- provision of detailed information adjusted to protect sensitive elements
- limited release of confidential information, such as through a NSP initiated confidentiality undertakings.

We strongly encourage Stakeholders to develop their own arrangements. This should occur before the NSP submits its Regulatory Proposal. Where this does not occur, we are more likely to use our information disclosure powers under the National Electricity Law (NEL) and National Gas Law (NGL) to authorise disclosure. As is clear from our issues paper<sup>12</sup>, draft Confidentiality Guideline and supporting Explanatory Statement this is not our preference. These powers are formal, resource and time intensive and tend to lead to “one size fits all” solutions. Therefore, they are unlikely to be satisfactory to Stakeholders.

With this position in mind we developed the Confidentiality Guideline and this supporting Explanatory Statement. They fundamentally guide our views on what information should be protected or disclosed and the manner in which NSPs are required to make confidentiality claims.

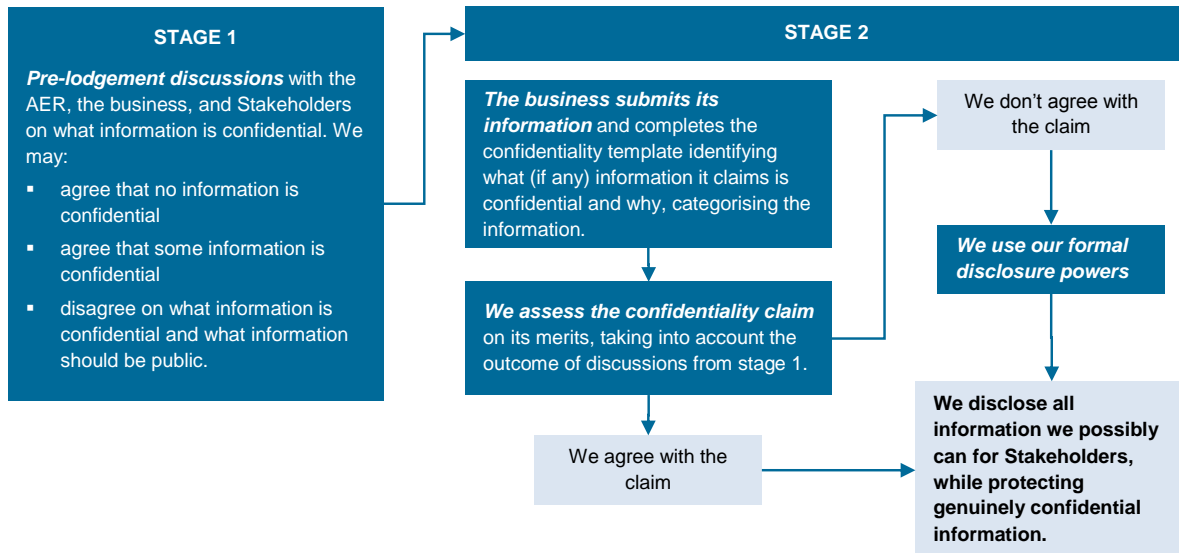
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<sup>11</sup> For example, where it is likely that disclosure would compromise commercial negotiations between NSPs and their suppliers.

<sup>12</sup> <http://www.aer.gov.au/sites/default/files/AER%20Issues%20paper%20-%20Confidentiality%20guidelines%20-%2018%20March%202013.pdf>

Figure 2.1 illustrates our process for handling confidentiality claims.

**Figure 2.1 Process for dealing with confidentiality claims**



## 3 Scope and coverage

### 3.1 Issue

Under the NER, the Confidentiality Guideline applies to and is binding on the following electricity distribution and transmission documents (Regulatory Proposals):<sup>13</sup>

- initial regulatory proposal
- revised regulatory proposal
- initial revenue proposal
- revised revenue proposal
- proposed negotiating framework
- revised proposed negotiating framework
- proposed pricing methodology
- revised proposed pricing methodology.

Our decision making role is much broader than assessing the documents in this list. Limiting the Confidentiality Guideline to the documents above would limit its ability to assist in delivering better regulatory decisions. It would also create different schemes for handling confidentiality claims, depending on the regulatory decision to which they apply.

In our draft Explanatory Statement we proposed extending the scope of the Confidentiality Guideline and Explanatory Statement beyond Regulatory Proposals. We proposed that they apply to submissions on electricity Regulatory Proposals, gas access arrangement proposals and responses to requests for information arising out of our information gathering powers<sup>14</sup> for gas and electricity.

### 3.2 Our approach

We will give the Confidentiality Guideline and Explanatory Statement as broad a scope as possible. The Confidentiality Guideline will have a substantial role in all electricity and gas regulatory decisions. Table 3.1 includes the most common areas where we will apply the Confidentiality Guideline, whether it will be binding and, if so, our relevant power to make it binding under current legislation.

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<sup>13</sup> NER, cl.6.14A(b) & (d), & cl.6A.16A(b) & (d).

<sup>14</sup> For example responses to RINs, as opposed to informal information requests.

**Table 3.1 Scope and Coverage of the Confidentiality Guideline**

Element of the Confidentiality Guideline	Context	Binding/Not binding	Relevant Provisions
Stage one - pre-lodgement discussions	All	Not binding - relevant consideration in using information disclosure powers	N/A
The manner in which NSPs must make confidentiality claims	Regulatory Proposals (electricity)	Binding	NEL sections - 28, 28F NER clauses - 6.8.2, 6.14A, 6A.10.1, 6A.16A
	Access Arrangement Proposals and Information (gas)	Binding	NGL sections – 42, 48
	Additions or amendments to Access Arrangement Proposals and Information (gas)	Binding	NGL sections - 42, 48
	Responses to requests for information arising out of our gathering powers	Binding	NEL sections - 28, 28F NGL sections - 42, 48
	NSP submissions on Regulatory Proposals (electricity), Access Arrangement Proposals and Information (gas)	Binding	NEL sections - 28, 28F NGL sections - 42, 48
	Pass through applications	Not binding - relevant consideration in using information disclosure powers	N/A
	Pricing proposals	Not binding - relevant consideration in using information disclosure powers	N/A
	Informal discussions and responses to informal requests for information	Not binding - relevant consideration in using information disclosure powers	N/A
Stage two - information disclosure powers	All	Binding.	NEL sections - 28W-28ZB NGL sections - 324-329

### 3.3 Reasons for our approach

We have sought to give the Confidentiality Guideline as broad a scope as possible because we consider that there is value in having a single well accepted approach for handling confidentiality claims.

The majority of NSPs are largely supportive of our approach. The ENA submitted that it supports the AER's approach to extend the scope of the Confidentiality Guideline to all confidential information provided to the AER.<sup>15</sup> However, the ENA also proposes that a distinction should be drawn (and made explicit in the Confidentiality Guideline) between confidentiality claims where the Confidentiality Guideline is binding and instances where it is applied as a preferred approach.<sup>16</sup> SP AusNet sought clarification on whether the Guideline applies to annual RINs.<sup>17</sup> ETROG submitted that the Confidentiality Guideline should also apply as the preferred approach to annual pricing proposals from NSPs in the years between the price determinations and price resets.<sup>18</sup>

To address the concerns raised by the ENA and SP AusNet, the Confidentiality Guideline now sets out when it is binding and when it is not.

We support ETROG's submission. Although the issues paper stated that we would consider applying the Confidentiality Guidelines to all information we receive from electricity NSPs and gas service providers<sup>19</sup>, extending the Confidentiality Guideline to annual pricing proposals was not directly addressed in the draft Explanatory Statement. On this basis, we sought specific comments from NSPs on this matter.<sup>20</sup> A majority of responses supported the approach. But, they also noted that due to the nature of the information,<sup>21</sup> material will be subject to confidentiality claims<sup>22</sup>.

APA, however, submitted that it does not consider it necessary to apply the Confidentiality Guideline to annual pricing proposals and that it was unclear how the AER intends to implement its proposal to the gas sector. Based on the draft Explanatory Statement APA also assumed that the AER would use a regulatory information instrument in relation to gas pricing proposals.<sup>23</sup>

As discussed above, we expect that Stakeholders will use the confidentiality template when making confidentiality claims in relation to annual pricing proposals for electricity and gas. We do not intend to use our information gathering powers, such as issuing a RIN, for annual pricing proposals.<sup>24</sup>

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<sup>15</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.3.

<sup>16</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.6.

<sup>17</sup> SP AusNet submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>18</sup> ETROG submission in response to the AER Draft Confidentiality Guideline, September 2013, pp.4-6.

<sup>19</sup> AER, Better Regulation, Distribution and Transmission Confidentiality Guidelines -Issues paper, p.20.

<sup>20</sup> AER email, 21 October 2013.

<sup>21</sup> Specifically, NSPs raised concerns about disclosing the demand of large customers'.

<sup>22</sup> Comments were received from the ENA, Envestra, APA Group, Ergon Energy, SP AusNet and the NSW DNSPs.

<sup>23</sup> APA letter, 25 October 2013.

<sup>24</sup> However, this may be reconsidered in the future if there are further changes to the NER in relation to pricing and tariffing provisions.

## 4 Confidential information

The overview of our position in section 2 presents the framework for our approach to the Confidentiality Guideline and confidentiality issues more broadly. It focuses on content rather than the format in which information is presented, who provided the information or under what conditions. This section specifies categories into which confidentiality claims must be classified. It also includes an indicative list of the types of documents often submitted that we generally consider should be in the public domain.

### 4.1 Issue

Under clauses 6A.14(b) and 6A.16(b) of the NER, the Confidentiality Guideline may include categories of confidential information by reference to which NSPs must classify any claims of confidentiality in their Regulatory Proposals.

### 4.2 Our approach

NSPs must classify confidentiality claims into the following categories:

*Information affecting the security of the network* - information which, if made public, may jeopardise security of the network or a NSP's ability to effectively plan and operate its network.

*Market sensitive cost inputs* - information such as supplier prices, internal labour costs, and information which would affect the NSP's ability to obtain competitive prices in future infrastructure transactions, such as tender processes.

*Market intelligence* - information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities.

*Strategic information* – information such as the acquisition of land and easements, where the release of this information might adversely impact the NSP's ability to negotiate a fair market price for these items.

*Personal information* - information about an individual or customer whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

*Other* - information which the NSP claims is confidential but does not fit into one of the above categories.

We intend to take a case by case approach to assessing confidentiality claims. This means that we will assess each confidentiality claim on its merits. Therefore, classification into a category will not guarantee protection.

### 4.3 Reasons for our approach

The Confidentiality Guideline specifies categories because we consider that doing so would provide NSPs with useful guidance. We also consider categories would make the confidentiality template<sup>25</sup> easier for NSPs to complete and a more useful document to us and Stakeholders.

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<sup>25</sup> See section 6, Manner in which NSPs must make confidentiality claims - confidentiality template

Specifying categories minimises any uncertainty that might otherwise exist as to the types of information we are more or less likely to protect. This should enable NSPs to make a reasonable prediction of the types of confidentiality claims and reasons we are likely to accept. In turn, this should enable NSPs to better target any confidentiality claims, making the confidentiality template easier to complete. Better targeting may also assist us and NSPs to minimise any avoidable administrative burden that arises from us exercising our information disclosure powers. Further, categories enable Stakeholders viewing the confidentiality template to quickly identify the areas in which NSPs make confidentiality claims.

Also, by taking a case by case approach, we avoid potential negative consequences from using categories. As we said in the issues paper,<sup>26</sup> in any given category, there will simultaneously be some information we should protect and some we should disclose. Taking a case by case approach allows us to strike the correct balance between protecting and disclosing information.

The list of categories remains unchanged from the draft Confidentiality Guideline. We selected these particular categories based on our experience in dealing with confidential information to date. While we will take a case by case approach, in our experience, these are the categories which most commonly contain information we should protect. Many of these categories are the same as, or similar to, the categories NSPs proposed and which the AEMC endorsed in its draft rule determination.<sup>27</sup> Therefore we consider this an appropriate list of categories for the Confidentiality Guideline.

Generally NSPs and Stakeholders were supportive of our decision to include categories of confidential information in our draft Confidentiality Guideline.<sup>28</sup> The ENA submitted that the establishment of categories will further the aim of streamlining the process of making confidentiality claims and reduce the administrative burden on the AER in assessing confidentiality claims.<sup>29</sup> Consumer representatives also supported our case by case approach.<sup>30</sup>

There were also submissions on specific issues relating to categories of confidential information. We consider those submissions in more detail below.

### **Proprietary information of a NSP or third party**

The ENA disagreed with our decision not to include its proposed category of 'proprietary information of an NSP or third party'.

We consider that a category for 'proprietary information of a NSP or third party' is overly broad. At some level, every written document could contain proprietary information or intellectual property. Copyright—a form of intellectual property—potentially arises in every piece of written information. Any person or entity who writes a document owns copyright in that document. Further, confidential information is itself a form of intellectual property. Therefore, allowing confidentiality claims to be justified on the basis that the information in question is 'proprietary' or 'intellectual property' could

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<sup>26</sup> AER, Better Regulation, Distribution and Transmission Confidentiality Guidelines - Issues paper, p. 17

<sup>27</sup> AEMC, Draft Rule Determinations Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012 and Draft National Gas Amendment (Price and Revenue Regulation of Gas Services) Rule 2012 p. 168

<sup>28</sup> NSW DNSPs submission in response to the AER Draft Confidentiality Guideline, September 2013, p.1.

<sup>29</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.6.

<sup>30</sup> UnitingCare submission in response to the AER Draft Confidentiality Guideline, September 2013, p.3 and ETROG submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

create an incentive for NSPs to claim a substantial proportion of their information as proprietary. It could also frustrate one of the key aims of the Confidentiality Guideline—requiring NSPs to justify claims for confidentiality—if such claims could be justified on the basis that the information is intellectual property because, for example, it is subject to copyright, or is confidential information. We also consider that this category creates an incentive for third parties to claim intellectual property over their information even when they may be content to disclose it.<sup>31</sup> We consider that where a third party has provided information to a NSP and claimed intellectual property over it, to the extent the information should not be disclosed, the information would likely fall under the categories 'market sensitive cost inputs' or 'strategic information'.<sup>32</sup>

The ENA submitted that this proposed category would provide NSPs with certainty that intellectual property will be assessed on its own merits, which would not be possible if intellectual property is subsumed into another category. ENA also disagreed with the AER's reasons for rejecting this as a standalone category.<sup>33</sup> Specifically, the ENA submitted that there were a number of problems with our reasons for rejecting this category. These were:

- our reasons are dismissive of the whole assessment process that the AER will use to check NSPs' confidentiality claims
- the AER retains the regulatory discretion to reject a claim of confidentiality, despite the information being within an established category
- the AER's suggestion that intellectual property could fall under the 'market sensitive cost inputs' or 'strategic information' category is misleading as intellectual property does not conform to such definitions.

For the reasons outlined above, we disagree with the ENA's submission. The Confidentiality Guideline will not include the category 'proprietary information of an NSP or third party'. If a NSP considers that proprietary information of a NSP or third party does not fall within 'market sensitive cost inputs' or 'strategic information', it is open to use the category 'other' to classify the information.

## Personal information

Ergon Energy submitted that the category 'personal information' should not be a category because it is already defined in the *Privacy Act 1988* (Cth) (the Privacy Act). Any discussion about the definition of disclosure or non-disclosure of personal information must be done in accordance with the current information Privacy Principles and the Impending Australian Privacy Principles.<sup>34</sup>

We do not agree with Ergon Energy's submission and consider that a category for 'personal information' is still necessary. The Privacy Act is an Australian law which regulates the handling of personal information about individuals. We have chosen to provide extra protection in the form of a standalone category. We consider having this category allows NSPs to identify information which should be protected because it is about an individual or customer whose identity is apparent or can reasonably be ascertained from the information.

Ergon Energy further submitted that obligations exist under rule 6.19.2 of the NER, to observe the confidentiality of information and pricing relating to individual retail customers.<sup>35</sup> We acknowledge this

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<sup>31</sup> AER, Explanatory Statement, Draft Confidentiality Guideline, August 2013, p.15.

<sup>32</sup> See above.

<sup>33</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.7.

<sup>34</sup> Ergon Energy submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>35</sup> Ergon Energy letter, 25 October 2013, p.2.



obligation and note that this information is subject to the NEL and NER. This type of information would therefore be covered by our information disclosure powers. We also consider that information about an individual retail customer could be considered personal information and therefore afforded protection under this category.

### Detriment to third parties

APA submitted that our proposed categories do not contemplate detriment to third parties.<sup>36</sup> APA raised concerns that certain information that is confidential to users or prospective users, or which is confidential to suppliers or contractors may be disclosed.<sup>37</sup> APA also submitted that in our draft Explanatory Statement we categorised user information as 'personal information'. APA disagreed with our categorisation and submitted the category 'personal information' would not encompass information that was commercially sensitive to a user or prospective user that might damage its position in a market in which that user competes.<sup>38</sup> Furthermore, APA had concerns that we linked supplier and contractor information to the category 'market sensitive cost input'.<sup>39</sup> To address its concerns, APA recommended that we redraft the 'market intelligence' and 'market sensitive cost inputs' categories to encompass both the release of information that would cause detriment to NSPs and the person that provided that information to the NSP.<sup>40</sup>

We disagree with APA's submission that the categories do not contemplate detriment to third parties. We do and will consider detriment a third party may incur if their information is placed in the public domain. Under s. 28ZB of the NEL and s. 329 of the NGL, we can disclose confidential information where the disclosure would not cause detriment to the Information Provider or the public benefit in disclosing the information outweighs any detriment. The Information Provider includes both:

- a person who gives information to the AER and
- if the person who gives the information to the AER in turn received that information from another person, that other person.<sup>41</sup>

Before disclosing information under these provisions we must consult with the Information Provider. Also, to clarify our position we have amended the Confidentiality Guideline to say that when providing reasons supporting how and why disclosure of the information would cause detriment, this detriment is to the Information Provider. This would include third parties as well as the NSP.

## 4.4 Guidance on what information Stakeholders should have access to

### 4.4.1 Issue

We think that practical guidance is necessary to ensure that the Confidentiality Guideline and Explanatory Statement are more useful. We have included an indicative list of the types of documents NSPs often submit that we generally consider they should place in the public domain.

### 4.4.2 Our approach

We consider the documents listed in Attachment 3 are documents, which NSPs often submit, which generally contain a majority of content that should be in the public domain. As a result, we consider

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<sup>36</sup> APA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.1.

<sup>37</sup> APA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>38</sup> See above.

<sup>39</sup> See above.

<sup>40</sup> See above.

<sup>41</sup> NEL, s.28ZB(1).

limited redactions are the most appropriate way of striking the balance between protection and disclosure of these documents.

### 4.4.3 Reasons for our approach

The documents listed in Attachment 3 are those documents that we generally consider NSPs should disclose publicly. This will in turn provide further practical guidance to Stakeholders. We based this practical guidance on our experience in dealing with confidential information to date. We have chosen the documents listed in Attachment 3 because, in our experience, they usually contain information that is central to justifying various aspects of a NSP's proposals. In particular, they generally include the data and analysis that are important to understanding and assessing the substance of all issues affecting other Stakeholders' interests. In our view, these documents reflect the information we will likely require from NSPs to support their expenditure proposal as outlined in our Expenditure Forecast Assessment Guidelines and Explanatory Statement.

We acknowledge the documents in Attachment 3 may also contain confidential information. However, in our experience the majority of the content of these documents should be in the public domain. As a result, we consider placing limited redactions over the confidential information is the most appropriate way of balancing protection and disclosure of these documents. This is not equivalent to full public disclosure of these documents. Rather it is disclosure sufficient to provide Stakeholders with access to information to enable them to understand the substance of all issues affecting their interests.

Ergon Energy submitted that it did not object to the documents listed in Attachment 3 being in the public domain provided it is policy and applied flexibly.<sup>42</sup> Ergon Energy also submitted that it considers that it is important that the AER's view that certain types of information would normally be made public does not become a presumption in favour of release.<sup>43</sup> As our comments above make clear, we will take a case by case approach to assessing whether to disclose or protect information.

Jemena submitted that the Independent Pricing and Regulatory Tribunal had excluded 'asset management plans' and 'business cases' from its disclosure requirements under the Water Industry Competition Act in 2011. It considered requiring the disclosure of these documents may result in the disclosure of information that is confidential, which in some circumstances may also present a security concern. Jemena submits that the AER should align its processes with this decision.<sup>44</sup> We acknowledge that there may be some confidential information in business cases and asset management plans that fall into confidentiality categories (such as security issues). We consider that such information would be limited and will be assessed on a case by case basis.

MEU disagreed with our decision not to disclose related party transactions.<sup>45</sup> MEU submitted that excluding documentation on related party arrangements results in less transparency and therefore can result in consumers paying more for the services than is intended.<sup>46</sup> We maintain the position we took in our draft Explanatory Statement not to require disclosure of related party transactions as a matter of course. This information may be important to understanding and assessing the substance of all issues affecting Stakeholders. However, it also may contain market sensitive cost inputs. Therefore, we will take a case by case approach to this type of information.

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<sup>42</sup> Ergon Energy submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>43</sup> See above.

<sup>44</sup> Jemena submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>45</sup> AER, Explanatory Statement, Draft Confidentiality Guideline, August 2013, p.6.

<sup>46</sup> APA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.8.

MEU submitted that Attachment 3 should be included in the Confidentiality Guideline<sup>47</sup>. We do not accept MEU's submission. Attachment 3 provides practical guidance to Stakeholders about the types of information which in our experience should be in the public domain. Including Attachment 3 in the Confidentiality Guideline might limit our ability to take a flexible case by case approach to assessing confidential information.

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<sup>47</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.9.

## 5 Stage one - pre-lodgement discussions

### 5.1 Issue

Pre-lodgement discussions are the focus of our approach to dealing with confidential information.

### 5.2 Our approach

Prior to a NSP lodging information,<sup>48</sup> we will work with Stakeholders to reach a shared, practical understanding of confidentiality issues. Our discussions will focus on:

- what information the NSP is claiming confidentiality over and the reasons for this claim
- what specific items should be protected or disclosed and in what form
- NSPs working with third parties to ensure that they limit confidentiality claims and provide confidential and public versions of all documents.

As part of stage one pre-lodgement discussions we expect each NSP to:

- engage with Stakeholders about the types of information they need access to in order to understand and assess the substance of all issues arising from the NSP's information. We would then expect the NSP to have regard to this when making any confidentiality claims.
- present information in a way that still maintains confidentiality but simultaneously provides Stakeholders with enough information to understand and assess the substance of all issues affecting their interests. This could be achieved through any of the following:
  - minimal redactions
  - narrower confidentiality claims
  - provision of detailed information adjusted to protect sensitive elements
  - limited release of confidential information to certain Stakeholders, such as through a NSP initiated confidentiality undertaking.<sup>49</sup>

### 5.3 Reasons for our approach

Pre-lodgement discussions are the focus of our approach to dealing with confidentiality claims because of the advantages these discussions can provide over using information disclosure powers. These include the ability for us and Stakeholders to explore creative options so all Stakeholders can understand and assess the substance of all issues affecting their interests. These might include:

- providing public information in sufficient detail for assessment without disclosing details that might negatively affect the long term interests of consumers
- providing detailed information subject to confidentiality undertakings, where details are key to understanding and assessing substance, but public or broader disclosure might negatively affect the long term interests of consumers.

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<sup>48</sup> For example, at the time we develop our framework and approach paper for electricity Regulatory Proposals and as part of the discussion for RINs for gas access arrangement proposals.

<sup>49</sup> AER, Explanatory Statement Draft Confidentiality Guideline, August 2013, p.11.

By focusing on pre-lodgement discussions, we will have a stronger understanding of what the NSP intends to claim confidentiality over and why. Therefore, we would expect to have no surprises in relation to the information the NSP claims is confidential and the reasons why the NSP considers this information confidential.

Submissions supported our collaborative process for resolving information protection and disclosure issues during stage one.<sup>50</sup> There were also submissions on specific issues relating to pre-lodgement discussions. We consider those submissions in more detail below.

### **Engage in stage one discussions with the AER and Stakeholders post lodgement**

The ENA submitted that it may not always be possible for all areas of disagreement to be known in advance of lodgement.<sup>51</sup> The ENA therefore proposed that there should be an opportunity to engage with the AER post-lodgement. SP AusNet and Jemena also made similar submissions.<sup>52</sup> SP AusNet submitted that discussions with the AER and consumer groups will be more efficiently carried out post-lodgement, when all parties can refer to the NSP's confidentiality template and revenue proposal. SP AusNet also submits that after lodgement, the revenue reset process lasts 15 months. Within this timetable there is sufficient time for Stakeholders to seek to obtain access to confidential information when required, and where access is granted, to assess this information.<sup>53</sup>

To the extent possible the majority of confidentiality issues should be identified and raised during stage one pre-lodgement discussions. In certain cases, such as where we do not understand an aspect of the NSP's confidentiality template, we may choose to engage with the NSP post-lodgement. However, this would be to confirm or clarify the NSPs reasons for claiming confidentiality over particular information.

### **Difficult to engage with all Stakeholders**

The ENA submitted that NSPs will not be able to engage with all Stakeholders on confidentiality matters prior to submitting their proposals.<sup>54</sup> SP AusNet made a similar submission saying that there may be a large number of Stakeholders and as a result consultation would be extremely resource intensive, costly (and inefficient).<sup>55</sup> The ENA submitted that the final Explanatory Statement should emphasise that it is open to Stakeholders to raise their concerns with the relevant NSP directly at any stage of the regulatory process.<sup>56</sup> The ENA submits that in many instances NSPs would agree to provide Stakeholders with detailed information on request and subject to confidentiality undertakings.

SP AusNet submitted that it is infeasible to expect that NSPs would be in a position to provide Stakeholders confidential information that will form part of their revenue proposals before the proposal is submitted.<sup>57</sup> SP AusNet also submitted that Regulatory Proposals are not provided to the NSP's Board for approval until a couple of days before lodgement.<sup>58</sup>

The NSW DNSPs made a similar submission which focused on their own particular circumstances. They submitted that whilst they are willing to work with the AER and Stakeholders on confidentiality

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<sup>50</sup> NSW DNSPs submission in response to the AER Draft Confidentiality Guideline, September 2013, p.1.

<sup>51</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

<sup>52</sup> SP AusNet submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2 and Jemena submission in response to the AER Draft Confidentiality Guideline, September 2013, p.1.

<sup>53</sup> SP AusNet submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>54</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

<sup>55</sup> SP AusNet submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>56</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

<sup>57</sup> SP AusNet submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>58</sup> See above.

issues during the development of the framework and approach papers, there will be limited opportunity for this in the lead up to the finalisation in the Phase 2 framework and approach paper for the NSW DNSPs. This is due to the contracted timeliness for the proposal as a result of the application of the Transitional Rules.<sup>59</sup> Also, in relation to public lighting customers they should have some scope for engagement in the lead up to the submission of their regulatory proposals in May 2014. For other customer groups and Stakeholders a more realistic expectation for 2014 Regulatory Proposals may be that the NSW DNSPs engage with Stakeholders more generally on the type of information that is likely to be the subject of confidentiality claims and that which could be released under the confidentiality undertakings.<sup>60</sup>

We acknowledge that in stage one, NSPs may not have developed very specific views as to what information they intend to claim confidentiality over. We also acknowledge the compressed timeline under which the NSW DNSPs will operate for their upcoming Regulatory Proposal. However, we still consider that NSPs will be in a position to have meaningful discussions with us and Stakeholders about their preliminary views on what information they are claiming as confidential and why.

While we acknowledge the limitations NSPs should, to the best of their ability, engage with Stakeholders such as consumer groups and major customers. This engagement should focus on the information the Stakeholder needs to access in order to understand and assess the substance of all issues relevant to the NSP's proposal. We would then expect NSPs to have regard to this when claiming confidentiality over information in their Regulatory Proposal. We also encourage Stakeholders to continue engaging on confidentiality issues at any time.

### **Sanctions for NSPs failing to engage in stage one pre-lodgement discussions**

The MEU submitted that the draft Explanatory Statement does not address failure of a NSP to work cooperatively with Stakeholders. The MEU proposes we impose sanctions where lack of information results in lessening of Stakeholder engagement.<sup>61</sup> The EUAA also made a similar submission. It submitted that NSPs may simply refuse to provide information requested.<sup>62</sup>

The creation of formal sanctions for not working cooperatively with Stakeholders is beyond what we can address in the Confidentiality Guideline. As set out in section 3, stage one pre-lodgement processes are not binding. However, we will consider Stakeholder engagement in deciding whether to exercise our disclosure powers. When determining whether to use our information disclosure powers, we will look beyond the content of the information and take into account whether the NSP has offered Stakeholders reasonable methods for accessing the information.<sup>63</sup>

### **Draft confidentiality template**

The MEU submitted that we should include an extra step in stage one - to provide a 'draft confidentiality template' to be released to Stakeholders for comment in advance of the NSP submitting its Regulatory Proposal.<sup>64</sup> We do not favour this approach. As set out in section 3, the NER limits the Confidentiality Guideline to specifying the manner in which NSPs must make confidentiality claims. Therefore, it does not allow the Confidentiality Guideline to require a draft confidentiality template.

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<sup>59</sup> NSW DNSPs submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>60</sup> NSW DNSPs submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>61</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.7.

<sup>62</sup> EUAA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>63</sup> AER, Confidentiality Guideline, November 2013, p.11.

<sup>64</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.7.

We also have concerns about how this would work in practice. It is clear that each NSP is required to comply with the Confidentiality Guideline when submitting its Regulatory Proposal. However, prior to this, the extent to which confidentiality claims are known with certainty, document by document, may differ between NSPs. Matters such as the timing, content and ensuring compliance with such a requirement are likely to limit the effectiveness of this additional step.

## 6 Manner in which NSPs must make confidentiality claims

### 6.1 Issue

The Confidentiality Guideline's scope is in relation to the manner in which NSPs must make confidentiality claims. This section sets out our approach to how NSPs must make confidentiality claims.

### 6.2 Our approach

NSPs must submit a confidentiality template in the form set out in Attachment 1 of the Confidentiality Guideline with each proposal. The confidentiality template provides for NSPs to specify, in respect of each claim for confidentiality, the following:

- the title, page and paragraph number of any document containing confidential information (regardless of the document's author)
- a description of the confidential information
- the topic the confidential information relates to (for example capex, opex, WACC, incentive mechanism etc.)
- the confidentiality category into which the NSP classifies the information
- a brief explanation of why the information falls into the selected category. If information falls within 'other' the NSP will need to provide further details on why the information should be treated as confidential
- reasons supporting how and why the Information Provider would incur detriment from the information being disclosed
- any reasons the NSP wishes to provide about public benefit considerations (especially public benefits such as the effect on the long term interests of consumers). This is optional, however, doing so would assist the AER to understand the NSP's concern and may limit the chances the AER uses its information disclosure powers.

In addition to the above, the Confidentiality Guideline requires NSPs to:

- in confidential versions of documents, highlight the confidential information in yellow shading
- provide a public version of the documents which contain the confidential information. The public version must clearly identify the confidential information that the NSP wishes to claim is confidential by redacting or 'blacking out' that confidential information. Public versions must retain the same formatting and page numbers as the confidential version.
- submit the completed confidentiality template in Microsoft Word format
- for electronic documents, specify in the filename whether it is "public" or "confidential."

We will publish completed confidentiality templates on our website as soon as possible after receipt.



NSPs must also complete the proportion of confidential material notice in Attachment 2 of the Confidentiality Guideline as part of the manner in which they must make confidentiality claims. NSPs must specify the number of pages in their submissions which contain a confidential claim and the number of pages which do not. We will use our information-gathering powers, where necessary, to achieve this.

When publishing the notice, we will include a note stating:

"This notice is an approximate indication of the proportion and comparative proportion of material in [insert title of NSP's Regulatory Proposal] that is subject to a claim of confidentiality compared to that which is not."

## 6.3 Reasons for our approach

The reasons for our approach to the manner in which NSPs must make confidentiality claims include:

- transparency as to what information NSPs claim is confidential and reasons why they consider the information to be confidential. This particularly relates to the requirement to complete the confidentiality template, publishing it, requiring NSPs to provide a public version of all documents and the proportion of confidential material notice.
- incentives to make genuine confidentiality claims. The requirements to provide reasons for confidentiality claims and to specify any detriment arising from disclosure will require a NSP to focus on how it will justify a confidentiality claim and provides an incentive to only make necessary claims.
- minimises the risk of accidental disclosure. Requiring confidential versions of documents to have appropriate file names and to include highlighted confidentiality claims provides greater clarity as to what information should be protected and minimises the risk of accidental disclosure.
- streamlined use of information disclosure powers where necessary. Pre-lodgement discussions are the focus of our approach. However, the requirements to provide reasons for confidentiality claims, to specify any detriment arising from disclosure and the ability to comment on public benefits are key considerations in exercising our information disclosure powers. Knowing NSPs' views on these at the time we receive confidentiality claims will better enable us to understand them and determine whether to use our information disclosure powers.

NSPs and consumer representatives were supportive of the confidentiality template we proposed in the draft Confidentiality Guideline. As a result, we have not made any substantive amendments to the confidentiality template we published in our draft Confidentiality Guideline.

The reasons for our approach to specific aspects of the confidentiality template are below.

### 6.3.1 Confidentiality template

#### Description & topic

Providing the title of the document containing confidential information will often be insufficient to allow Stakeholders to understand the relevance of the information claimed to be confidential. Therefore the confidentiality template requires NSPs provide both a brief description of the information and identify the topic (i.e. the rate of return, opex, capex etc.) to which the information relates. We consider this information would provide consumers with a better understanding of the nature of the information

which NSPs are claiming confidentiality over, without revealing any confidential information. A description of the nature of the material claimed to be confidential is more likely to make the confidentiality claim's justification obvious. This may quickly allay any concerns from Stakeholders that they are being denied access to vital information, and may reduce their desire to see the information.

### **Classifying confidentiality claim into relevant category & reasons for classification**

As discussed in section 4, we have recognised a number of confidentiality categories including the category 'other'. Using confidentiality categories will assist us to:

- streamline the process for making confidentiality claims
- provide NSPs with guidance and clarity on the nature of information which could be considered confidential, thus reducing the number of unnecessary or excessive confidentiality claims
- alleviate the administrative burden on us in assessing confidentiality claims by identifying a basis for which confidentiality is being claimed, enabling us to easily assess whether the confidentiality claim is genuine and whether the information is of a nature that should be subject to public scrutiny
- retain the regulatory discretion for us to reject a claim for confidentiality.

Classifying information into a category does not mean it will be protected. We will take a case by case approach to determining whether we will protect or disclose information. This requires NSPs to provide reasons supporting why they consider the information is confidential.

### **Reasons for confidentiality claim**

The confidentiality template requires NSPs to justify confidentiality claims.<sup>65</sup> This justification must address how disclosure would cause detriment to the Information Provider. This approach is consistent with the AEMC's position to improve transparency and accountability by requiring NSPs to nominate the reasons why they consider material is confidential.<sup>66</sup>

APA submitted that the confidentiality template does not consider detriment to a party other than the NSP and that the information disclosure provisions under the NEL and NGL are not limited to considering detriment to the NSP. APA also submitted that where detriment of disclosure relates to a third party, the NSP is unlikely to be able to provide significant information as to the likely detriment of public disclosure. APA therefore recommends that the identification of detriment be an optional aspect of the Confidentiality Guideline (or be limited to providing information 'to the extent reasonably possible') to address this issue.<sup>67</sup> Finally, APA submitted that NSPs can be expected to provide information on the likely detriment of disclosure as it is in their interest to have confidentiality claims accepted by the regulator. The absence of clear reasons why information would be considered confidential increases the risk that the regulator will determine to disclose information. Specific obligations through the Confidentiality Guideline or information instruments to require reasons therefore do not appear necessary.<sup>68</sup>

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<sup>65</sup> AER, Better Regulation, Distribution and transmission Confidentiality Guidelines - Issues paper, Attachment 1 p.23.

<sup>66</sup> AEMC, Final rule determination, 29 November 2012, p.xi.

<sup>67</sup> APA Group submission in response to the AER Draft Confidentiality Guideline, September 2013, p.3.

<sup>68</sup> APA Group submission in response to the AER Draft Confidentiality Guideline, September 2013, p.3.

We have amended the Confidentiality Guideline so that it is clear that the detriment relates to any Information Provider. We accept that the information disclosure powers under the NEL and NGL are not limited exclusively to NSPs. It is because of this that the confidentiality template refers to detriment without specifying who suffers that detriment.

We do not agree with APA's submission that where detriment of disclosure relates to a third party, the NSP is unlikely to provide information as to that detriment and therefore identifying detriment should be optional. NSPs submit third party information to support claims they have made. If NSPs wish to have the benefit of third party information it is incumbent on them to take responsibility for ensuring that that information can be scrutinised by Stakeholders and that we are made aware of any reasons in support of why that information should be protected.

We also do not agree with APA's submission that it is not necessary to require NSPs to provide reasons for their confidentiality claim. Our experience to date has been that NSPs claim confidentiality over entire documents or entire submissions. Often these claims were not accompanied with any explanation of why the information is confidential. Therefore, it was difficult to determine whether the information was genuinely confidential.

### **Identify whether detriment is outweighed by the public benefit in disclosure**

NSPs may address whether the detriment they have identified is not outweighed by the public benefit in disclosing the information.

The MEU submitted that this should not be optional and NSPs should be required to provide this explanation as it may prevent NSPs from claiming a narrow detriment against a wide public benefit.<sup>69</sup> We acknowledge the MEU's submission but maintain the position we took in our draft Confidentiality Guideline to make this requirement optional.

Although this requirement is optional, we are keen to take into account where disclosure might impact on public benefit considerations. NSPs have regularly made such submissions in response to initial disclosure notices issued under s. 28ZB of the NEL and s. 329 of the NGL in the past.<sup>70</sup> We see no reason why this could not continue. We would be interested if NSPs have a view about such matters. For example, if a NSP considers disclosure is likely to result in higher prices for consumers, this is an issue that we would like to know about.

Also, we are keen to know about any steps a NSP has taken during stage one or in their proposal that ensure Stakeholders already have access to sufficient information to enable them to understand and assess the substance of all issues affecting their interests. For example, in consultation, some NSPs said that they deliberately provide information in two formats. First, in the public aspects of their proposals, they place sufficient detail in the public domain to enable Stakeholders to understand and assess the substance of all issues affecting their interests. Second, they submit greater detail subject to a confidentiality claim.

For these reasons, we encourage NSPs to address public benefits in their reasons for confidentiality claims.

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<sup>69</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.9.

<sup>70</sup> NEL, s.28ZB(2).

## 6.3.2 Other matters relating to the manner in which NSP must make confidentiality claims

### Public version of the document

We require NSPs to provide a public version of each document which they claim contains confidential information, even if fully redacted. In our experience, very few documents contain solely confidential information. The ENA submitted that some redactions may be so great that the redacted version of the document would be of limited use to a reader.<sup>71</sup> We consider that the majority of documents will contain a mix of confidential and non-confidential information and often the confidential information is in small parts. Therefore, that which can be disclosed should be. We acknowledge wholly redacted documents would be undesirable. But we consider our approach will focus NSPs' minds on whether such an extensive redaction is necessary.

Ergon Energy submitted that whilst redacting or 'blacking out' confidential information might be appropriate for PDF or word documents, it may not be appropriate for Excel spreadsheets as this may not completely protect the confidential information from disclosure.<sup>72</sup> This does not reflect our experience. NSPs' responses to our information gathering powers have provided redactions for these types of file formats.

The ENA also sought clarification on how NSPs would need to present documents in support of their proposal where release of these documents in the public domain will lead to a breach of copyright. The ENA asked about how a NSP can redact a journal article it may wish to provide in support of its proposal if such an article represents proprietary information. The ENA also submits that most of these documents are already available in the public domain and access to them typically involves taking up a subscription or paying a one-off fee.

As we said above NSPs submit third party information, including proprietary information, to support claims they have made. If NSPs wish to have the benefit of third party information it is incumbent on them to take responsibility for ensuring that that information can be scrutinised by Stakeholders and that we are made aware of any reasons in support of why that information should be protected.

### Publishing the completed confidentiality template on the AER website

We will publish all confidentiality templates on our website as soon as possible after we receive them. The confidentiality template itself must not contain any confidential information. At most, it should contain a description of confidential information.

NSPs were supportive of our proposed confidentiality template. However, some NSPs had concerns that in some circumstances it may be difficult to complete the confidentiality template without disclosing sensitive information. The ENA submitted that in some instances, the articulation of potential detriment may require a high level of detail.<sup>73</sup> ActewAGL proposed that any confidential information provided in support of confidentiality claims be presented to the AER in discussions with the AER or as a confidential attachment to the confidentiality template.<sup>74</sup>

We do not accept the ENA or ActewAGL's submissions. To ensure transparency and confidence in the decision making process, it is necessary for Stakeholders to be aware of information they cannot access and the reasons why. We consider that publishing the confidentiality template would allow

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<sup>71</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.6.

<sup>72</sup> Ergon Energy letter in response to comments sought regarding annual pricing proposals, 25 October 2013, p.3.

<sup>73</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.5.

<sup>74</sup> ActewAGL submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

Stakeholders to understand what information is being withheld from them and why the NSP seeks to withhold this information. We also consider publishing the confidentiality template may improve relations between Stakeholders. During consultations, we observed substantial distrust between NSPs and other Stakeholders on confidentiality issues. It is likely that the majority of the information described in the confidentiality templates will be uncontroversial. However, at present, many Stakeholders do not understand what information is being withheld from them or why. As a result, they believe the worst—that information key to determining network prices is being withheld and that they are adversely affected as a result. Publishing the template may limit this concern. It may also show that much confidential information really does not affect the substance of all issues relevant to Stakeholders.

Also, publishing the confidentiality template gives Stakeholders the opportunity to identify specific information they consider should be disclosed/accessed. Furthermore, the knowledge that a NSP's confidentiality template will be public creates incentives to minimise claims to those that are really necessary and provide quality justifications.

Finally, our experience from responses to initial disclosure notices issued under s. 28ZB of the NEL and s. 329 of the NGL raises questions as to whether it is necessary to address this concern. We have received numerous responses to initial disclosure notices in recent years. All responses included substantial reasons in support of why the NSP considered the information is confidential. However, none of those responses included confidential information.

### Requirement to complete the confidentiality template

We require NSPs to submit a confidentiality template in each of the circumstances specified in Table 3.1.

We consider the confidentiality template makes NSPs accountable for their confidentiality claims. It requires NSPs to provide clear and logical reasons as to why we should protect information. This will assist us to determine whether we should protect or disclose information. We also consider the confidentiality template will help us to strike the right balance between protecting confidential information, while maximising Stakeholder ability to scrutinise proposals.

As mentioned above, the Confidentiality Guideline is binding in relation to Regulatory Proposals.<sup>75</sup> If a Regulatory Proposal that we receive does not comply with the Confidentiality Guideline, we may require a NSP to resubmit that Regulatory Proposal.<sup>76</sup> Similar provisions apply for gas access arrangement information.<sup>77</sup>

We did not receive any submissions on this issue.

### 6.3.3 Proportion of confidential material notice

We must publish a notice on our website that sets out the proportion of material in NSP Regulatory Proposals that is subject to a claim of confidentiality compared to that which is not.<sup>78</sup> We consider NSPs are better placed to provide us with this information as part of their pre-lodgement preparations. For us to undertake this task we would need to divert resources from analysing proposals that are subject to tight timeframes. We acknowledge our method of measuring the proportion of confidential

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<sup>75</sup> NER, cl. 6.9.1(a) & cl. 6A.11.1(a).

<sup>76</sup> NER, cl.6.9.1(a) & cl.6A.11.1(a)(8).

<sup>77</sup> NGR, r. 43(3)

<sup>78</sup> NER, cl.6.9.2A(b) & cl.6A.11.2A(b).

to non-confidential information may not be perfect, but is quick and simple to apply. We accept this method may not present the most accurate picture of precisely how much information a NSP is claiming confidentiality over. However, it is a practical option which we will pursue, especially as we did not receive any responses to our request in the draft Explanatory Statement for suggestions from Stakeholders on alternative methods.

## 7 Stage two - information disclosure powers

### 7.1 Issue

Our information disclosure powers are part of the broader scheme for dealing with confidentiality claims. Therefore, it is appropriate that we provide some guidance on our approach to using them.

### 7.2 Our approach

We aim to resolve as many confidentiality issues as possible in stage one, through pre-lodgement discussions. However, for those confidentiality issues we do not resolve at stage one, we will use our information disclosure powers. The most common circumstances where these powers allow us to disclose confidential information are where disclosure:

- would not cause detriment to the Information Provider; or the public benefit in disclosing the information outweighs any detriment<sup>79</sup>
- will accord a person affected by our decision natural justice.<sup>80</sup>

We will assess each confidentiality claim on a case by case basis. Where we agree with the claim, we will protect the information. Where we disagree, we will examine the claim against our information disclosure powers. In determining whether to use our information disclosure powers, we will look beyond the content of the information. Specifically, we will take into account:

- how the information claimed to be confidential could affect the interests of the Stakeholder seeking access
- whether the substance of the issue the information relates to is already in the public domain
- Stakeholder engagement during stage one
- if the NSP objects to disclosure, its reasons
- whether, in the past, other NSPs have claimed confidentiality over or publicly disclosed the same type of information.

#### 7.2.1 Disclosure of information if detriment does not outweigh public benefit - s. 28ZB and s. 329

Of the various information disclosure powers we have, we most often use the power provided to us in s. 28ZB of the NEL and s. 329 of the NGL. Under these provisions we must decide whether:

- disclosing the information would cause detriment to the person who has given it to us or to the person from whom that person received it; or
- although the disclosure of the information would cause detriment to such a person, the public benefit in disclosing it outweighs that detriment.

If we are considering whether to disclose the information under s. 28ZB or s. 329, we issue the Information Provider with an initial disclosure notice. This notice outlines:<sup>81</sup>

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<sup>79</sup> NEL, s.28ZB and NGL, s. 329.

<sup>80</sup> NEL, s.28Y(c) and NGL, s. 326(c).

1. our intention to disclose the information
2. the nature of our intended disclosure
3. short, document-by-document reasons as to why we believe:
  - a. disclosing the information would not cause detriment to the Information Provider; or
  - b. the public benefit in disclosing the information outweighs any detriment.
4. that within the timeframe specified, the Information Provider may make representations to us on why we should not disclose the information.

We must give the Information Provider a minimum of five business days to respond to the initial disclosure notice.<sup>82</sup> The actual time we allow depends on the volume and complexity of information we propose to disclose.

If within the prescribed timeframe, the Information Provider responds to the initial disclosure notice, we consider the response. We disclose any information the Information Provider has consented to placing in the public domain. Where we agree with the response, we protect that information. Where we disagree, we issue a further disclosure notice which outlines:<sup>83</sup>

1. our intention to disclose the information;
2. the nature of the intended disclosure
3. reasons as to why we consider that:
  - a. disclosing the information would not cause detriment to the Information Provider; or
  - b. the public benefit in disclosing the information outweighs any detriment to the Information Provider.

We then proceed to disclose the information.

### **7.2.2 Disclosure to accord natural justice - s. 28Y(c) and s. 326(c)**

We will use our ability to disclose information for the purposes of according natural justice to a person affected by our decision under s. 28Y(c) of the NEL and s. 326(c) of the NGL. This may involve limited information disclosure subject to a confidentiality undertaking. Having a confidentiality undertaking as a condition for disclosure would give NSPs a remedy for any breach of that undertaking. Disclosure under a confidentiality undertaking involves the following steps:

- as soon as possible after receiving an NSP's completed confidentiality template, we will publish it on our website.
- a Stakeholder that wants access to confidential information would apply to us. The Stakeholder must provide a signed confidentiality undertaking.<sup>84</sup> The undertaking must specify the information sought, using the document titles the NSP uses in its confidentiality

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<sup>81</sup> NEL, s.28ZB(2) and NGL, s. 329(2).

<sup>82</sup> NEL, s.28ZB(5) and NGL, s. 329(5).

<sup>83</sup> NEL, s.28ZB(6) and NGL, s. 329(6).

<sup>84</sup> Attachment 4 includes our template undertaking. It is based upon that applying to Consumer Challenge Panel members.



template. The undertaking must be both to us and the NSP. The Stakeholder must also provide a covering note explaining why they want access to the information

- we would then forward the signed undertaking and covering note to the NSP and seek its views.
- we would consider the covering note and any NSP views and decide whether or not to grant access to all or some of the information requested.

The confidentiality undertaking published in the draft Explanatory Statement did not allow Stakeholders to discuss the confidential information with us, the relevant NSP or other Stakeholders who have executed a confidentiality undertaking in relation to the confidential information. We have amended the confidentiality undertaking to permit this.

## **7.3 Reasons for our approach**

As mentioned in our overall policy position, our preference is to resolve all or many confidentiality issues in stage one. However, our ability to continue to use information disclosure powers is also necessary, as a backstop.

Our information disclosure powers provide incentives for Stakeholders to reach agreement and develop their own methods for sharing information. Specifically, NSPs that provide access to information in sufficient detail to allow Stakeholders to understand and assess the substance of all issues affecting their interests are likely to retain control over what information is placed in the public domain. Not doing so may result in raw data being placed in the public domain. Equally, Stakeholders seeking access to information should accept reasonable NSP offers to access the information claimed to be confidential.

We will not use our information disclosure powers in all circumstances. We are unlikely to disclose information where we consider an NSP has provided access to information in sufficient detail to allow Stakeholders to understand and assess the substance of all issues affecting their interests. We consider our approach to exercising our information disclosure powers provides a balanced incentive for all parties to act reasonably in trying to reach agreement, minimising the need for us to use our information disclosure powers.

Submissions from Stakeholders were supportive of us using our information disclosure powers sparingly. They also supported limited disclosure of confidential information subject to a confidentiality undertaking. There were also submissions on specific issues relating to our information disclosure powers. We consider those submissions in more detail below.

### **7.3.1 Persons affected by our decision**

The ENA submitted that the AER will need to give careful consideration to the form of disclosure that it considers necessary to accord natural justice. APA submitted that the AER has not provided sufficient detail on how it will determine whether a person is sufficiently affected by a decision to activate natural justice concerns. 'Persons affected' should be limited to people affected to a greater degree than an ordinary member of the public, or the public in general. APA also submitted that the AER should publish guidance setting out who may be affected by a decision and what a Stakeholder must prove to show they are affected and entitled to disclosure. Furthermore, APA submits that it

would be appropriate for an 'affected person' to provide the AER with information supporting its claim including:<sup>85</sup>

- reasons as to why they might be adversely affected by not having access to such information;
- how they will benefit from access to that information; and
- why they are adversely affected beyond what an ordinary member of the public would suffer.

CitiPower, Powercor and SA Power Networks submitted that it expects that the AER would use s. 28Y(c) consistent with Victorian Tribunal precedent<sup>86</sup> where the AER intends to rely on confidential information of other parties when substituting values in a NSP's distribution determination.

We acknowledge the ENA's submission and will give consideration to what is necessary to accord natural justice. In response to APA's submission, we note that the concept of an affected person is well understood in administrative law and we have the same understanding.

We do not accept APA's submission as to the particular types of reasons Stakeholders should provide when seeking to access confidential information under a confidentiality undertaking. For the purposes of determining whether to grant a Stakeholder access to confidential information, we will focus on the reasons why the Stakeholder wants access to the information. Specifically, we will consider whether the information is necessary to enable the Stakeholder to understand and assess the substance of all issues the NSP raised.

Finally, in response to CitiPower, Powercor and SA Power Network's submission, we will apply all relevant precedents when exercising our information disclosure power under s. 28Y(c).

### 7.3.2 Confidentiality undertaking

NSPs were generally supportive of a confidentiality undertaking being a condition for disclosure under s.28Y(c). The ENA made the following submissions on the confidentiality undertakings we proposed in our draft Explanatory Statement:<sup>87</sup>

1. Any confidentiality undertaking required by the AER when it exercises its powers of disclosure be executed by a natural person. ENA submitted that by only having individuals execute any undertaking ensures that it is clear that there are appropriate limits on the use and disclosure of confidential information rather than any potential misrepresentation that the information may be accessible by an organisation at large.

We accept the ENA's submission and have removed the confidentiality undertaking for an organisation. We have also made minor drafting amendments to the confidentiality undertaking to enable it to be signed by an individual. A copy of this undertaking can be found at Attachment 4.

2. Incorporate a list of the information to be disclosed in a schedule to the undertaking. Each document should be labelled with a unique identifier to ensure that the AER, and the NSP, can keep track of the documents disclosed pursuant to the undertaking. The above ensures that there is certainty and transparency in the information which is subject of the undertaking.

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<sup>85</sup> APA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

<sup>86</sup> [2012] ACompT 8 (5 April 2012)

<sup>87</sup> ENA submission in response to the AER Draft Confidentiality Guideline, September 2013, p.9.

We accept the ENA's submission and have added the ENA's proposed schedule to the confidentiality undertaking.

3. Broaden the definition of 'confidential information' to include any document or things (or parts of the documents or things) constituting, recording or containing any of the confidential information in the third party's possession, custody or control. This amendment makes clear that if the confidential information is reproduced (for example the information is presented in a different way in analysis undertaken by the third party), the third party's obligations of confidentiality extend to that analysis.

We do not accept the ENA's submission to broaden the definition of 'confidential information.' We consider that the undertaking proposed in our draft Explanatory Statement is sufficient to cover the reproduction of the confidential information.

4. Require the third parties accessing confidential information:
  - a. ensure that there are appropriate measures in place to safeguard the confidential information, as well as requiring the third party to return or destroy the confidential information after ceasing to use the information for the approved purpose at the request of the AER; and
  - b. do not reproduce or make any copy of the confidential information without prior written consent of the AER.

The ENA submits that the above obligations ensure that there is no doubt about the limitations that are placed on the third party subject of the undertaking. In particular, if the third party wanted to scan the document onto its computer then the AER's consent would be required and it would be upon the third party to demonstrate to the AER that it had sufficient safety measures to protect that information from unauthorised access on its network.

We do not accept the ENA's submission. We consider that the undertaking proposed in our draft Explanatory Statement is sufficient to cover the purpose for which the information is permitted to be used. Also, like the AER, Stakeholders learn and improve their reasoning by looking at material from previous regulatory decisions. Material from one regulatory decision is often relevant to another. Provided the material is not disclosed beyond what the confidentiality undertaking allows, we consider that NSPs would suffer no detriment.

5. The undertaking should include a schedule which may list other persons who have executed an undertaking relating to that information, as well as provide flexibility for other persons, who at the time of the execution of the undertaking were not bound by confidentiality obligations in respect of the confidential information. The ENA submits that this amendment acknowledges that organisations may have a number of staff, as well as external advisers, who may need to access the confidential information for the authorised purpose of making a submission in respect of the relevant regulatory decision.

We consider that a proposed schedule is unnecessary to achieve this outcome. We have amended the confidentiality undertaking to provide for individuals that have signed the undertaking to share information appropriately.

6. Insert an acknowledgement that the obligation to keep information confidential does not apply to information which is in the public domain.

This is not necessary. We would not use a confidentiality undertaking to disclose information that is already in the public domain. Under s. 28ZAB of the NEL and s. 328A of the NGL, the AER is

authorised to disclose information given to it in confidence, if that information is already in the public domain.

7. Require the signature of the individual executing the deed poll to be witnessed by a person who is not a party to the deed.

We accept the ENA's submission and have amended the confidentiality undertaking to reflect this.

8. The AER should take a flexible approach to the undertaking. Amendments to the template may be appropriate in order to tailor the confidentiality undertaking to the particular circumstances. ENA also submitted, in pursuit of good regulatory practice the development of the undertaking in each case should be done in consultation between the AER, the NSP and the third party.

We will take a flexible approach when executing confidentiality undertakings. We will also take into account the particular circumstances involved.

Ergon Energy submitted that the confidentiality undertaking should require consent from NSPs (as the owner of the confidential information).<sup>88</sup> We do not accept Ergon Energy's submission. As mentioned above we will seek the view of the NSP prior to disclosing the information.

APA submitted that a confidentiality undertaking may not provide sufficient protection for service provider's confidential information. This is because service providers have limited remedies for breach.<sup>89</sup> Also, APA submits that it is difficult to conceive that the beneficiary of confidential information pursuant to a confidentiality undertaking will, even subconsciously, not use that information for purposes outside those set out in the undertaking. APA submitted that it is unclear whether the confidentiality undertaking applies to disclose information that is confidential to a party other than the service provider.<sup>90</sup>

We do not accept APA's submission that the undertaking does not provide sufficient protection to NSPs. It is open to NSPs to take action against a Stakeholder for breach of a confidentiality undertaking. Also, depending on the circumstances where a Stakeholder breaches a confidentiality undertaking we would be unlikely to accept future confidentiality undertakings from that Stakeholder.

Also, the confidentiality undertaking is a unilateral arrangement and not an agreement. We consider that a confidentiality undertaking could be from the information seeker to us, NSP and a third party.

Finally, the MEU submitted that the confidentiality undertaking should be included in the Confidentiality Guideline. The MEU also sought clarification on whether information obtained under a confidentiality undertaking which a Stakeholder then uses in its submission would be given less weight by the AER in accordance with clauses 6.14(e) and 6A.16(e) of the NER.<sup>91</sup>

We do not accept the MEU's submission that the confidentiality undertaking should be in the Confidentiality Guideline. This is a model confidentiality undertaking. Including the confidentiality undertaking in the Confidentiality Guideline might limit our ability to be flexible and take into account the particular circumstances involved. Further, clauses 6.14(e) and 6A.16(e) provide that we may give less weight to confidential information provided in submissions as we consider appropriate, having regard to the fact that such information has not been made publicly available. The exercise of this discretion is unaffected by any confidentiality undertaking that may be in place.

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<sup>88</sup> Ergon Energy submission in response to the AER Draft Confidentiality Guideline, September 2013, p.2.

<sup>89</sup> APA Group submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

<sup>90</sup> APA Group submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.

<sup>91</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.10.

## 8 Other issues raised in submissions

Table 9.1 outlines other issues raised by Stakeholders in submissions on the draft Confidentiality Guideline and draft Explanatory Statement.

**Table 9.1 Other issues raised in submissions**

Issue	Submission	Our response
Including process information contained in the Explanatory Statement in the Confidentiality Guideline	The MEU submitted that the Confidentiality Guideline should provide all details of what the process will be rather than just outline the development of the confidentiality template. The Confidentiality Guideline should be a standalone document rather than have a need to continually refer back to the Explanatory Statement. <sup>92</sup>	We have included additional sections in the Confidentiality Guideline which outline the scheme for handling confidentiality claims and specifies the scope of the Confidentiality Guideline in greater detail.
Monitoring of NSP confidentiality claims	The MEU submitted that we should maintain a register of what each NSP claims is confidential and compare these over time. <sup>93</sup>	We accept the MEU's submission that we should formalise its current practice of monitoring and comparing confidentiality claims over time through a register.
Confidentiality limits stakeholder engagement	The MEU submitted that NSPs use 'confidentiality' to limit stakeholder engagement and maximise revenue. NSPs can still 'game' the process and release useful information too late for useful stakeholder input. <sup>94</sup>	The Confidentiality Guideline is designed to strike a balance between protecting and disclosing information for an open and transparent regulatory decision making process. Our aim is for Stakeholders to have access to sufficient information to understand and assess the substance of all issues affecting their interests.
Interaction with other Better Regulation Guidelines	Uniting Care submitted that the Confidentiality Guideline intersects with the expenditure forecast Guideline, consumer engagement work stream and shared assets Guideline. <sup>95</sup>	We have worked with all relevant Better Regulation work streams to ensure consistency across the different Guidelines.
Information gathering powers	Ergon Energy raised concerns about the premise that the AER determines whether or not a claim of confidentiality is properly made. Ergon Energy's view is that it is not for the AER to determine whether the information is confidential or not. In its view, once confidentiality is declared the only question for the AER is whether it has the power to disclose that information, notwithstanding the fact that it is confidential. <sup>96</sup>	This submission appears to misunderstand our position. Our focus is on whether we have the power to disclose information in accordance with the NEL and NGL. Also, other than in respect of the confidentiality template, we do not determine whether or not a confidentiality claim is properly made.

<sup>92</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.6.  
<sup>93</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.10.  
<sup>94</sup> MEU submission in response to the AER Draft Confidentiality Guideline, September 2013, p.11.  
<sup>95</sup> UnitingCare submission in response to the AER Draft Confidentiality Guideline, September 2013, p.4.  
<sup>96</sup> Ergon Energy submission in response to the AER Draft Confidentiality Guideline, September 2013, p.1

## Attachment 1 - Confidentiality template

<p>Title, page and paragraph number of document containing confidential Information.</p>	<p>Description of the confidential information.</p>	<p>Topic the confidential information relates to (e.g. capex, opex, the rate of return etc.)</p>	<p>Identify the recognised confidentiality category that the confidential information falls within.</p>	<p>Provide a brief explanation of why the confidential information falls into the selected category.  If the confidential information falls within 'other' please provide further details on why the Information should be treated as confidential.</p>	<p>Specify reasons supporting how and why detriment would be caused from disclosing the confidential information.</p>	<p>Provide any reasons supporting why the identified detriment is not outweighed by the public benefit (especially public benefits such as the effect on the long term interests of consumers).</p>

## Attachment 2 - Proportion of confidential material

Submission Title	Number of pages of submission that include information subject to a claim of confidentiality	Number of pages of submission that do not include information subject to a claim of confidentiality	Total number of pages of submission	Percentage of pages of submission that include information subject to a claim of confidentiality	Percentage of pages of submission that do not include information subject to a claim of confidentiality

Note: This notice is an approximate indication of the proportion and comparative proportion of material in [insert title of NSP's Regulatory Proposal] that is subject to a claim of confidentiality compared to that which is not.

## Attachment 3 - List of documents for public disclosure

As mentioned in section 4.4 this attachment lists documents that generally should be in the public domain. As a result, we consider limited redactions are the most appropriate way of striking a balance between protection and disclosure of these documents.

Examples listed below relate to our most recent electricity and gas distribution reviews for regulatory proposals by Aurora Energy in 2011 and the Victorian gas businesses in 2012, respectively.<sup>97</sup>

Document type	Description and examples
Consultant reports	<p>A report provided by a third party engaged by the NSP to provide advice on a particular aspect of the NSP's regulatory proposal. This would also include Auditor reports. For example:</p> <ul style="list-style-type: none"> <li>▪ Demand forecasting methodologies and load forecasts</li> <li>▪ Material and Labour cost escalation methodologies and forecasts</li> <li>▪ Audit reports on regulatory models</li> <li>▪ Benchmarking studies.</li> </ul>
Asset management plans	<p>These are the plans for planning and managing the NSP's network and the development of the forecast capital and operating expenditure proposal. These plans would include long term network development, asset planning, asset management and network maintenance.</p> <p>Examples include:</p> <p>Aurora Energy's Management Plan 2011, which includes system operations, reliability power quality, demand management, connections, metering, public lighting and vegetation management; and Envestra's Victorian and NSW Asset Management Plan, which includes plans regarding asset performance, network management and asset life cycles.</p>
Business cases for proposed projects	<p>These are the documents that sit under the asset and management plans that set out the justification and recommendation for a specific project that makes up part of the regulatory proposal.</p> <p>A business case typically provides for the following:</p> <ul style="list-style-type: none"> <li>▪ Identification of the need for the project</li> <li>▪ Detailed outline of the proposal</li> <li>▪ Benefits of the proposed approach</li> <li>▪ Evaluation of the alternatives</li> <li>▪ Costs of the selected approach and considered alternatives, including a risk assessment</li> </ul>

<sup>97</sup> The material published by the AER for Aurora Energy can be found at <http://www.aer.gov.au/node/182>. The material for the Victorian gas businesses can be found at: <http://www.aer.gov.au/node/13556> (APA GasNet) <http://www.aer.gov.au/node/14473> (Envestra Victoria) <http://www.aer.gov.au/node/4799> (Multinet Gas) <http://www.aer.gov.au/node/4810> (SP AusNet).



- Plans for the effective delivery of the project.

An example is APA GasNet's Augmentation Business Case for the Gas to Culcairn Project (Attachment C-4, BC 083).

<p>Financial models including underlying assumptions</p>	<p>These are the models used to derive the outputs that underlie the regulatory proposal. They include the models:</p> <ul style="list-style-type: none"> <li>used by the AER, such as the roll forward and post-tax revenue models</li> <li>developed by the NSPs to support proposed capital and operating expenditure for standard control services</li> <li>for alternative control services, such as fee based services, metering and public lighting.</li> </ul> <p>An example of this is Aurora Energy's Public Lighting Annuity Model v.2.</p>
<p>Forecast and actual expenditure (including by category)</p>	<p>This relates to actual, estimated and forecast operating and capital expenditure values which may be aggregated and disaggregated into the NSP's individual work categories (e.g. growth, reinforcement or replacement related capital expenditure).</p> <p>For example, see the Aurora Energy's RIN Response Part A (General), Part B (Capital Expenditure) and Part C (Operating and Maintenance Expenditure).</p>
<p>Financial statements</p>	<p>Financial statements of the NSP, including profit and loss and balance sheets.</p> <p>NSP's should provide financial information in their annual reporting Regulatory Information Notices issued by the AER, in addition to their obligations under the Corporations Act and the Australian Stock Exchange rules, where applicable.</p>
<p>Changes in provisions</p>	<p>Provisions are a liability of an amount, the timing of which is uncertain. Provisions may include:</p> <ul style="list-style-type: none"> <li>annual and long service leave</li> <li>superannuation</li> <li>workers compensation claims</li> <li>taxes, such as income and payroll tax.</li> </ul> <p>Changes in provisions represent actual expenditure. A request for this information (i.e. the annual amount in the movement in provisions) is often included in the AER's Regulatory Information Notice and accompanying template.</p> <p>See Aurora Energy's RIN Response Part C (Operating and Maintenance Expenditure), section 14.</p>
<p>Efficiency benefit sharing scheme data</p>	<p>This is usually a copy of the EBSS model calculating the proposed carryover amount.</p> <p>This would include an explanation of all cost categories proposed to be excluded from the scheme (i.e. why it is uncontrollable)</p> <p>See Aurora Energy's Regulatory Proposal 2012-2017, Chapter 24</p>
<p>Demand management incentive scheme data</p>	<p>This data is reported annually to the AER for ex-post approval as required by the scheme. Examples of the scheme data can be found on the AER's website at: <a href="http://www.aer.gov.au/node/484">http://www.aer.gov.au/node/484</a></p>

Network performance data

This covers data relating to network System Average Interruption Duration Index (SAIDI), System Average Interruption Frequency Index (SAIFI), and Momentary Average Interruption Frequency Index (MAIFI) measures, outages information and customer service parameters.

See Aurora Energy, Attachments to the RIN response Part 3 STPIS data, including category target modelling by kVA, category target modelling by customer, all outage data MED calculations and STPIS customer targets and expected growth in NMI's and kVA connected.

Network metrics

Physical description of the network such as:

- line length
- number of customers
- number of substations.

See Aurora Energy, Attachments to the RIN response Part 3 Demand & customer number forecasts.

Network demand

This includes:

- a description of the methodology used to prepare forecasts of maximum demand, energy and customer numbers
- the expected forecasts of demand for the whole of the network, and more detailed breakdowns, including peak demand forecasts by zone.

See Aurora Energy, Attachments to the RIN response Part 3 Demand & customer number forecasts.

Asset installation data and commentary that explains data or a NSP's position and justification for its expenditure proposal.

Details of proposed capital works, including scope, justification, non-network alternatives and forecast expenditure.

See Aurora Energy, RIN response Part B – Capital Expenditure; Aurora Energy, Attachments to the RIN response Part 1 Capital expenditure; Aurora Energy, Attachments to the RIN response Part 2 Capex.

## Attachment 4 - Confidentiality undertaking

I [NAME]..... of  
[ORGANISATION NAME]  
[ORGANISATION ADDRESS]

(a) acknowledge that all information provided to me by the Australian Energy Regulator ('the AER') pursuant to section 28Y of the National Electricity Law or section 326 of the National Gas Law contained in the documents listed in Schedule A ('the Confidential Information') was provided by the AER in confidence;

(b) undertake to the AER and to [NSP NAME] :

(i) to use the Confidential Information only for the purposes of producing and providing submissions to the AER regarding distribution determinations, transmission determinations or access arrangements as defined in the National Electricity Law and National Gas Law;

and

(ii) not to disclose, publish or communicate or otherwise make public, either directly or indirectly:

(1) the Confidential Information as provided by the AER;

(2) the Confidential Information as incorporated in [ORGANISATION NAME] submissions as permitted under subclause (b)(i) above; or

(3) any data analysis or other work undertaken by [ORGANISATION NAME] from which the Confidential Information can be identified or derived,

except where disclosure is:

(4) to the AER;

(5) to [NSP NAME]

(6) to another person who is also bound by a confidentiality undertaking in relation to the Confidential Information

(7) with the written prior approval of the AER or [NSP NAME]

(c) To avoid doubt, this undertaking does not prevent [ORGANISATION NAME] from disclosing, publishing or communicating its submissions provided that the Confidential Information is redacted from such submissions.

Executed as a Deed Poll on,,,,,,,,,,,,,,,,,,,,,,,,,,,,,

Signed, Sealed and Delivered by:

Name.....

Signature.....

Date.....

Witnessed by:

Name.....

Signature.....

Date.....

### Schedule A - Confidential Information

No	Document name	Date
A1		
A2		
A3		
A4		
A5		

## Attachment 5 - Summary of submissions

**Table 1.1 Summary of submissions on the draft Confidentiality Guideline**

Issue	Stakeholder	Summary
Scope and coverage	Ergon Energy	<p>Supports the AER's general approach.</p> <p>Supports the application of the Confidentiality Guideline in a non-binding manner to all information other than that submitted as part of a regulatory or revenue proposal. However, in relation to the application of the Confidentiality Guideline to a NSP's pricing proposal, Ergon Energy has concerns about the treatment of individual customer information and notes that obligations exists under rule 6.19.2 of the NER.</p>
	ENA (supported by Jemena, Ergon Energy, ActewAGL, SP AusNet, SA Power Networks, Citipower and Powercor)	<p>Supports the general approach, subject to suggested amendments.</p> <p>Supports the application of the Confidentiality Guideline as policy to other areas, subject to a common-sense approach, and the fact that the Confidentiality Guideline is only binding for NEL issues should be expressly stated in the final Confidentiality Guideline.</p> <p>Considers that the Confidentiality Guideline would not be a practical approach for annual RINs and category analysis RINs. Considers that it would be appropriate to adopt as much of the Confidentiality Guideline process as is practical in the circumstances of the application, the extent to be determined in Stage one discussions with the AER. Notes that pre-lodgement discussions are still important where the Confidentiality Guideline is non-binding as they allow the AER and the NSP to resolve as many confidentiality claims as possible.</p>
	EUAA	<p>Generally sympathetic but consider that the administrative burden of complying with the Confidentiality Guideline will be easier for NSPs to shoulder than other stakeholders such as consumer groups.</p> <p>On balance, supports the AER's approach but encourages the AER to bring the relative 'importance' of each confidentiality claim made by NSPs to the attention of stakeholders.</p>
	UnitingCare Australia	Supports the intent of the Confidentiality Guidelines.
	Etrog Consulting	<p>Supports the application of the Confidentiality Guidelines more broadly.</p> <p>Requests the AER consider using its confidentiality powers to release pricing proposals (subject to redactions of confidential information, such as sensitive tariffs) which include models of regulatory revenue income. Notes that such models were released by jurisdictional regulators in the past and are useful for stakeholders.</p>
	MEU	<p>Supports the general approach and notes that the ability to claim confidentiality over information should be restricted as far as possible.</p> <p>The Confidentiality Guideline should outline the entire confidentiality process rather than the development of the template.</p> <p>Considers that the Confidentiality Guideline should contain all information relevant to the AER's confidentiality process.</p>
	APA Group	<p>It not necessary to apply the Confidentiality Guideline to pricing proposals, gas pricing proposals and formal information instruments. Expects that the AER will continue to protect pricing models and the application of the Confidentiality Guideline to these processes would not increase information disclosure, and will operate only to increase administrative burden on NSPs.</p>

	SP AusNet	Agrees in principle with applying the Confidentiality Guidelines as policy to other confidentiality applications. Notes that including the confidentiality template in RINs may not be the most efficient way for NSPs to present confidentiality claims.
Confidential information categories	Ergon Energy	No need for 'personal information' to be a confidential information category as it is already protected by the Privacy Act 1988.
	ENA (supported by Jemena, ActewAGL, SP AusNet, SA Power Networks, Citipower and Powercor)	Generally supports the use of categories.  The AER should include a category relating to 'proprietary information of an NSP or third party'. The use of other categories to protect intellectual property isn't viable as intellectual property does not align with the other proposed categories. The AER's concern that the category would be used as a 'blanket category' to claim confidentiality over documents which should be released can be remedied by the case-by-case approach.
	ActewAGL	Supports the use of categories generally but emphasises the case-by-case approach will be necessary.
	NSW DNSPs	Supports the use of categories.
	APA Group	Supports the use of categories.  The AER should assess categories not only with reference to harm to the NSP but to third parties. The Confidentiality Guideline should specifically acknowledge that information which is confidential to a third party will fall within the categories.  The 'personal information' category will not protect commercially sensitive information.
	UnitingCare Australia	Supports the use of categories though notes the potential for misuse of 'market sensitive cost inputs'. Notes the AER's case-by-case approach should prevent such misuse. Accepts the 'personal information' category as consistent with the Privacy Act.
	Etrog Consulting	Considers the 'market sensitive cost inputs' category too broad, but the concerns have been somewhat allayed by the proposed case-by-case assessment. Considers that assessment should apply to all categories.
Stage one - pre-lodgement discussions	ENA (supported by Jemena, ActewAGL, SP AusNet, SA Power Networks, Citipower and Powercor)	It may not always be possible for all areas of disagreement to be known in advance of lodgement. Subsequently, there should be an opportunity to engage with the AER post-lodgement. NSPs will not be able to engage with all stakeholders on confidentiality matters prior to submitting their proposals. The final Explanatory Statement should emphasise that it is open to stakeholders to raise their concerns with the relevant NSP directly at any stage of the regulatory process.
	ActewAGL	Supports the focus on a more collaborative process, and making pre-lodgement, informal discussions the focus of the confidentiality process.
	NSW DNSPs	Supports collaborative pre-lodgement approach, noting truncated timeframes for Framework and Approach papers.
	SP AusNet	Has doubts about the effectiveness of pre-lodgement discussions at resolving all confidentiality issues.
	UnitingCare Australia	Supports the process, given the Stage 1 opportunity for all stakeholders to work through confidentiality issues.
	MEU	The AER should require NSPs to provide a completed template in the initial informal stage, so that the AER, NSP and other stakeholders can identify the confidentiality issues raised by the NSP's application and fully

ventilate them prior to lodgement.

Considers that the requirement for NSPs to provide detail of public benefit should be mandatory.

Stage two - submitting confidential information	ENA (supported by Jemena, ActewAGL, SP AusNet, SA Power Networks, Citipower and Powercor)	Supports the confidentiality template. However, in some instances it may be difficult to complete the confidentiality template without disclosing sensitive information. These concerns could be resolved during pre-lodgement discussions with the AER.  Sought clarification on how to present documents where public disclosure may lead to breach of copyright. Also, some documents may contain a large proportion of confidential information so that a redacted version may be of limited use to a reader.
	Jemena, ActewAGL and SP AusNet	Confidentiality Guidelines or Explanatory Statement should include an informal post-lodgement process to deal with unresolved confidentiality issues prior to formal disclosure powers.
	Jemena and ActewAGL	Confidentiality Guidelines should set out a process to deal with situations where information provided in support of a confidentiality application is, itself, confidential.
	ActewAGL	Supports the revised confidentiality template proposed by the AER. However, proposed that any confidential information provided in support of confidentiality claims be presented to the AER in discussions or as a confidential attachment to the confidentiality template.
	SP AusNet	The confidentiality template should be used only where it is efficient to do so.
	APA Group	The confidentiality template should not require NSPs to establish detriment, given the detriment may be to a third party.  Supports making public benefit submissions optional.
	UnitingCare Australia	Considers the confidentiality template sound and supports it as proposed.  Supports the case-by-case approach.  Supports publication of redacted documents.
	MEU	Supports the confidentiality template in its current form.  Supports the publication of documents with confidential information redacted.
Information disclosure powers	Ergon Energy	Considers that there should not be a presumption in favour of releasing confidential information just because the information falls into a category of documents which are typically released.
	ENA (supported by Jemena, ActewAGL, SP AusNet, SA Power Networks, Citipower and Powercor)	NSPs preference is to be the first point of contact prior to any application to access information being lodged with the AER by a stakeholder.  The AER should ensure that s28Y(c) disclosure requires the 'affected person' to prove their interest beyond that of an ordinary affected member of the public, and should consider using limited, rather than general, disclosure where appropriate.
	SA Power Networks, Citipower and Powercor	The use of the natural justice provisions should be exercised consistent with Victorian Tribunal precedent.
	APA Group	Stakeholders seeking access on natural justice grounds should be required to show they are adversely affected 'beyond an ordinary member of the public, or the public generally'.  NSPs should have the right to comment or refute an application for



disclosure.

Confidentiality undertakings	Ergon Energy	Considers that the undertaking should require the recipient to destroy or dispose of the information once the process is completed. Considers that the recipient should obtain the permission of the NSP before disclosing or otherwise using the confidential information.
	ENA (supported by Jemena, ActewAGL, SP AusNet, SA Power Networks, Citipower and Powercor)	Supports the use of a confidentiality undertaking, however the ENA proposed a number of amendments: that the confidentiality undertaking be executed by a natural person only, that the confidential information be specified in the undertaking, that the definition of 'confidential information' be broad enough to capture replications, and that the stakeholders be required to meet information management requirements so that copies of the information cannot be made without consent. ENA also attached an amended confidentiality undertaking to this effect.  Also proposed using schedules to the undertaking to specify officers/other individuals who have taken similar undertakings.  Undertakings should be flexible and open to amendment.
	ActewAGL	Supports the option for limited disclosure but concerned that the undertaking in AER's proposed form does not sufficiently safeguard information.
	ActewAGL and NSW DNSPs	Support ENA's amended undertaking.
	MEU	Supports the use of undertakings. Supports the draft template proposed by the AER. Considers that the template should be a standard document which cannot be altered for different circumstances.  Aspects of stakeholder submissions which are confidential due to the application of an undertaking should be given the same weight as public submissions.
	APA Group	Considers the undertaking will not sufficiently protect the rights of a wronged NSP.  Considers the undertaking does not contemplate a situation where the confidential information belongs to a third party.
Attachment 3	Jemena	AER should consider precedent regarding release of business plans/what information is confidential (IPART decision in 2011).
	NSW DNSPs	While the kinds of document which may be considered disclosable is useful, the AER should approach it as a guide and focus on the content of the relevant document rather than the kind of document (e.g. there may be confidential information in a business case which should not be disclosed).
	MEU	This list of documents should be included in the Confidentiality Guideline proper.  Documents relating to third party transactions/arrangements should be included in the list in attachment 3 because these transactions are often used by NSPs as an alternative route to increased profits.
Other issues	UnitingCare Australia	Notes that the Confidentiality Guideline has issues in common with other Better Regulation work streams - market sensitive cost inputs relates somewhat to expenditure forecasting; consumer engagement issues; and shared assets issues. Requests the AER maintain consistency across these areas.
	MEU	The AER should develop sanctions for NSPs who approach the

confidentiality process intransigently.

Suggests the AER keep records of what kinds of confidential claims are made by NSPs and use those records as a tool for assessing reasonableness of confidentiality claims.

APA Group

Requests the AER advice SCER that it will not require NSPs to provide public benefit analysis relating to their confidentiality claims.

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**Table 1.2 Summary of issues raised at CRG meetings**

Issue	AER response
<p>The Confidentiality Guideline should have more information regarding process for confidentiality claims, categories of confidential information, public lighting, enforcement and resolving disagreements.</p>	<p>The Confidentiality Guideline includes an outline of the process and what is expected of NSPs during the pre-lodgement stage. However, the Confidentiality Guideline is required to specify the manner in which NSPs may make confidentiality claims in their Regulatory Proposals and is binding on NSPs and us.</p> <p>The process for making confidentiality claims in the pre-lodgement stage is not binding on NSPs and represents our preferred practice. Formal sanctions for not working co-operatively with stakeholders are outside the scope of the matters we are permitted to consider under the NER. See section 5.3 of this Explanatory Statement and sections 1.2 and 1.3 of the Confidentiality Guideline.</p> <p>The categories included in the Confidentiality Guideline are considered a reasonable balance to protecting confidential information on the one hand and disclosing information for an open and transparent regulatory decision making process on the other. We will to take a case by case approach to assessing confidentiality claims and therefore classification into a category would not guarantee protection. This should mitigate any concerns we and stakeholders have about the potential to withhold fundamental data from stakeholders.</p>
<p>Concern was expressed by a number of parties about the balance between the two documents released by the AER. The Confidentiality Guideline's focus on protecting confidentiality in a short and relatively generic manner. In contrast, the Explanatory Statement is much more detailed, contains most of the guidance on disclosure principles but is not a mandatory instrument.</p>	<p>As above, the Confidentiality Guideline is binding on NSPs and us, and is only required to specify the manner in which NSPs make confidentiality claims.</p>
<p>The Confidentiality Guidelines needs to be much more specific in terms of the process, enforcement and approach to resolving disputes. Where does consumer engagement sit in the process when things get messy?</p>	<p>The pre-lodgement process, including the enforcement and resolution of disputes regarding this process are not matters that can be specified in the Confidentiality Guideline under the NER.</p> <p>The remedy for non-compliance with the Guideline is that we may require a NSP to resubmit its Regulatory Proposal. However, when determining whether to use our information disclosure powers, we will look beyond the content and take into account whether the NSP has engaged with stakeholders. See section 5.3 of this explanatory statement.</p>
<p>Of the list of Confidentiality Categories, the item of greatest concern by far was "Market Sensitive Cost Inputs" with the concern that this could be used to claim confidentiality over a wide array of activities.</p>	<p>The concerns over the category 'market sensitive cost inputs' being too broad is addressed through our case by case approach to considering all confidentiality claims submitted with the NSPs Regulatory Proposal.</p>
<p>Concerned about the AER's proposal to not ask NSPs to release street lighting maintenance data. Street lighting maintenance data, by type of lighting, is an essential prerequisite for informed customer choice about lighting types and to enable customer groups to know whether appropriate service levels are being monitored and achieved.</p>	<p>There are a number of items, such as street lighting data, where this information may be important to understanding and assessing the substance of the issues affecting stakeholders. However, it is likely that these items may also contain market sensitive cost inputs. On balance, it is considered preferable to apply our case by case approach to this information. This does not preclude stakeholders from engaging directly with NSPs to gain access to information that goes to the substance of the issues affecting them.</p>